COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
JOHN K. GRANT (169813)
CHRISTOPHER M. WOOD (254908)
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)
johnkg@csgrr.com
cwood@csgrr.com

MURRAY, FRANK & SAILER LLP
BRIAN P. MURRAY
275 Madison Avenue, Suite 801
New York, NY 10016
Telephone: 212/682-1818
212/682-1892 (fax)
bmurray@murrayfrank.com

Co-Lead Counsel for Intervening Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION	MDL No. M:02-cv-01486-PJH NOTICE OF MOTION AND MOTION TO INTERVENE PURSUANT TO FRCP 24(b) AND FOR MODIFICATION OF THE JULY 11, 2003 PROTECTIVE ORDER DATE: July 23, 2008 TIME: 9:00 a.m. COURTROOM: The Honorable Phyllis J. Hamilton

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on July 23, 2008, at 9:00 a.m., before the Honorable Phyllis J. Hamilton, movants herein will ask this Court for an Order allowing movants to intervene pursuant to Federal Rule of Civil Procedure ("FRCP") 24(b) and to allow them access to materials subject to this Court's July 11, 2003 Protective Order, including materials filed under seal. This motion is supported by the following memorandum of points and authorities, all pleadings and papers filed herein, arguments of counsel, and any other matters properly before the Court.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether plaintiffs in two collateral actions alleging misrepresentations concerning the illegal price-fixing of DRAM are entitled to intervene in this action pursuant to FRCP 24(b) in order to seek modification of this Court's July 11, 2003 Protective Order.

2. Whether substantial duplication of effort can be avoided and cost and time savings achieved by allowing the plaintiffs in the collateral actions access to discovery already made in this Multi-District Litigation ("MDL") proceeding subject to this Court's July 11, 2003 Protective Order and materials filed under seal.

3. Whether the Ninth Circuit's decisions in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003); *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); and *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470 (9th Cir. 1992) strongly encourage, if not require, modification of the July 11, 2003 Protective Order to allow the collateral litigants access to relevant discovery including materials designated confidential and materials filed under seal.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION AND SUMMARY OF RELEVANT FACTS

Movants are plaintiffs in two actions for securities fraud. One action is before the Hon. James Ware in this District. The other action is in the U.S. District Court in Idaho. Both of the collateral actions involve the same price-fixing conspiracy that is the subject of *In re Dynamic Random Access Memory (DRAM) Litigation*, No. M:02-cv-01486–PJH ("DRAM Antitrust Litigation") currently pending before this Court. Movants International Union of Operating Engineers, Local 132 Pension Plan and Chemical Valley Pension Fund of West Virginia are plaintiffs in the District of Idaho action, captioned *In re Micron Technology, Inc. Securities Litigation*, Case No. 1:06-CV-00085-BLW ("Micron Action"). Movants Reinhard Schroeder, Charter Township of Clinton Police & Fire Retirement System and Graziella Peano are plaintiffs in the action in this District, captioned *In re Infineon Technologies AG Securities Litigation*, Master File No. C-04-4156-JW ("Infineon Action").

The DRAM Antitrust Litigation pending in this Court is an MDL proceeding arising from a criminal price-fixing conspiracy that targeted the DRAM market, roughly between 1999 and 2002. The participants in that conspiracy included Infineon Technologies AG ("Infineon") and Micron Technology Inc. ("Micron"), the principal corporate defendants in the Infineon and Micron Actions.

The Infineon and Micron Actions were filed on behalf of investors who acquired Infineon and Micron securities. The cases allege that Infineon's and Micron's executives made misrepresentations concerning the competitive nature of DRAM prices and concealed their participation in the price-fixing conspiracy, that investors considered DRAM price levels important in deciding whether to invest in Infineon and Micron, and that investors suffered losses when Infineon's and Micron's misconduct was disclosed and the conspiracy ended. Both cases have survived motions to dismiss. Copies of the Micron and Infineon operative complaints are attached as Exhibits A and B to the Declaration of John K. Grant in Support of Motion to Intervene Pursuant to FRCP 24(b) and for Modification of the July 11, 2003 Protective Order ("Grant Decl."), filed herewith. Copies of the orders denying the motions to dismiss are attached as Exhibits C and D to the Grant Decl.

Because many of the relevant facts overlap, much of the discovery necessary in the Infineon and Micron Actions has already been produced in the DRAM Antitrust Litigation and there is no reason to re-invent the wheel. As plaintiffs in the Infineon and Micron Actions, movants will want to prove not only that the price-fixing conspiracy existed, but that it was effective in increasing DRAM prices. Movants will need to submit expert testimony quantifying the impact of the conspiracy on DRAM prices. Movants will also seek discovery from various of the participants in the conspiracy concerning their contacts with Infineon and Micron. Because hundreds of thousands of dollars in cost savings may be realized, in addition to substantial time savings achieved, movants respectfully request that this Court modify its July 11, 2003 Protective Order to allow movants access to materials covered by that Order.

One of the primary benefits promoted by MDL co-ordination is the substantial cost savings that can be achieved from avoiding duplicative discovery. The same benefit can be achieved by allowing movants access to the existing discovery in the MDL proceeding. Indeed, Federal Rule of Civil Procedure 1 directs that the federal rules be administered in such a manner as to achieve the "speedy and inexpensive determination of every action." That is precisely what granting this motion would help achieve.

Movants also note that the documents at issue relate to events that occurred over six years ago. The relevant documents, moreover, are unlikely to include technical schematics or similar intellectual property. As such, while defendants are certainly entitled to the protections of the July 11, 2003 Protective Order, it is difficult to imagine what injury or prejudice would result from any disclosure of the "confidential" materials. There is certainly no risk of injury or prejudice from disclosure to movants.

II. PLAINTIFFS IN THE COLLATERAL SECURITIES ACTIONS ARE PROPER INTERVENORS AND CONTROLLING NINTH CIRCUIT LAW STRONGLY SUPPORTS THE SHARING OF DISCOVERY WITH COLLATERAL LITIGANTS

Three controlling Ninth Circuit decisions are directly on point and counsel very strongly in favor of allowing collateral litigants access to confidential discovery materials. In *Foltz*, 331 F.3d at 1127, the Ninth Circuit addressed "when parties other than the original litigants may gain access to

materials that a court has placed under a protective seal." Plaintiffs in a subsequent lawsuit against State Farm "sought access to both discovery materials and court records" in the *Foltz* action.

The Ninth Circuit explained that ***"This court strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation,"*** and that "Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery." *Id.* at 1131.[1] The Ninth Circuit cited with approval the same rule adopted by the Tenth and Seventh Circuits and held that:

> Where reasonable restrictions on collateral disclosure will continue to protect an affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted.

Id. at 1132; *see also* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure §2044.1 (2d ed. 1994).

In *Olympic*, 332 F.2d 260, plaintiffs brought a private action with antitrust allegations similar to those made in an earlier suit brought by the government. Subpoenas were issued requesting the production of certain discovery responses made in the earlier action that were subject to protective orders in the earlier action prohibiting the disclosure of the information. *Id.* at 261. The district court refused to allow the plaintiff in the collateral action access to the prior discovery and the Ninth Circuit reversed. The Ninth Circuit held that the prior protective orders should have been modified "to meet the reasonable needs of other parties in other litigation." *Id.* at 264. The Ninth Circuit explained:

> Olympic, a litigant in another antitrust action based on the same alleged violations, seeks access to those documents for purposes of discovery. ***It is entitled to have the orders . . . modified . . . to permit access to the documents subject to reasonable restrictions as to disclosure***, whether or not some of the information contained in them may still be regarded as trade secrets or sensitive competitive information.
>
> It is immaterial that Olympic could possibly obtain the same information through the process of propounding its own interrogatories to Standard and General. It is entitled to know what those companies and the alleged co-conspirators told the

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[1] Unless otherwise noted, emphasis is added and citations and quotations omitted.

> Government, and this requires examination of the documents which were exchanged, or exchanged and filed in that action.

Id. at 265-66.

In *Beckman*, 966 F.2d 470, parties in a subsequent action sought access to depositions taken in the *Beckman* action and subject to a protective order. *Id.* at 471. Parties to the subsequent action moved to intervene in *Beckman* "for the purpose of moving to modify the protective order to gain access to the six deposition transcripts." *Id.* The district court granted the motions and the defendant in *Beckman* appealed. *Id.* at 472.

With respect to intervention, the Ninth Circuit held that intervention pursuant to FRCP 24(b) was "a proper method to modify a protective order." *Id.* The Ninth Circuit also agreed with the district court that "the importance of access to documents prepared for similar litigation involving the same parties satisfied the commonality requirement of 24(b)" and noted that a separate pleading was not required. *Id.* at 474.

With respect to the modification of the protective order, the court stated that "Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation" and noted "the importance of eliminating duplicative discovery." *Id.* at 475. The Ninth Circuit affirmed the modification of the protective order to allow the plaintiffs in the collateral action access to the discovery in the earlier case. *Id.* at 476. The requested access "sought to meet the reasonable needs of other parties in other litigation" and defendants objections "under these circumstances could not, without more, justify refusal to modify when there is a reasonable request for disclosure." *Id.*

Not surprisingly, the Ninth Circuit's rulings in these cases are consistent with the position taken in the Manual for Complex Litigation. Addressing "Other Practices to Save Time and Expense," the Manual notes that "If related cases are pending in more than one court, coordinated common discovery can prevent duplication" and that "Interrogatory answers, depositions, and testimony given in another action ordinarily are admissible if made by and offered against a party in the current action." David F. Herr, Manual for Complex Litigation 11.423 (4th Ed. 2007).

III. DISCOVERY TAKEN IN THE DRAM ANTITRUST LITIGATION IS RELEVANT TO AND DISCOVERABLE IN THE MICRON AND INFINEON SECURITIES ACTIONS

Under the *Foltz* decision, the court that entered the initial protective order should consider whether "the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided by modifying the protective order." 331 F.3d at 1132. Relevant considerations include the "degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings." *Id.* The district court that issued the initial order "makes only a rough estimate of relevance," and "the only issue it determines is whether the protective order will bar the collateral litigants from gaining access to the discovery already conducted." *Id.*

Here, the collateral Infineon and Micron Actions involve the same price-fixing conspiracy that is at the heart of the DRAM Antitrust Litigation. The participants in the alleged conspiracies are the same because it is the same conspiracy. The Infineon Action is brought on behalf of investors who acquired Infineon securities between March 13, 2000 and July 19, 2004. Third Amended Complaint for Violations of the Federal Securities Laws ("Infineon Complaint"), ¶1, filed July 17, 2007 (Dkt. 159). The Infineon Complaint names Infineon Technologies AG and Infineon Technologies North America Corporation as corporate defendants and alleges that they were participants in a price-fixing conspiracy targeting DRAM prices between 1999 and 2002. Infineon Complaint, ¶¶2-3, 13-14. The Infineon Complaint alleges price-fixing misconduct by Peter Schaefer, Gunter Hefner, Heinrich Florian, and T. Rudd Corwin, each vice-presidents of the corporate defendants. Infineon Complaint, ¶¶25-34. As this Court is aware, Schaefer, Hefner, Florian, and Corwin were sentenced and served prison time due to their participation in the price-fixing conspiracy. The Infineon Complaint further alleges that senior Infineon executives Ulrich Schumacher, Peter J. Fischl, and Andreas von Zitzewitz were aware of and participated in the misconduct. Infineon Complaint, ¶¶35-46.

In addition to the price-fixing conspiracy, the Infineon Complaint alleges that because Infineon's securities prices were tied to DRAM price movements, the manipulation and inflation of DRAM prices (due to the price-fixing conspiracy) necessarily artificially inflated Infineon's

securities prices. Infineon Complaint ¶¶5-6, 109-115. When the conspiracy was disclosed and when it ended, Infineon's stock price returned to non-inflated levels and investors (unaware of the criminal conspiracy) lost millions of dollars. *Id.*

Similarly, the Micron Action was filed on behalf of investors who acquired Micron securities between February 24, 2001 and February 13, 2003. Amended Complaint for Violation of the Federal Securities Laws ("Micron Complaint"), filed May 25, 2007 (Dkt. 92), ¶1. The Micron Complaint names Micron as a corporate defendant, together with its corporate officers, Michael W. Sadler, Steven R. Appleton, and Wilbur G. Stover, Jr. Micron Complaint, ¶¶20-23. The Micron Complaint alleges that Micron was a participant in the DRAM price-fixing conspiracy during 2001 and 2002, that Micron's securities traded at inflated prices as a direct result of the DRAM price-fixing conspiracy, and that Micron's senior executives were aware of and directly participated in the conspiracy and made statements to investors that concealed and misrepresented the existence of the price-fixing misconduct. Micron Complaint ¶¶2-8. The Micron Complaint alleges that Micron's securities prices were similarly tied to DRAM price levels and that Micron's investors lost millions of dollars due to the disclosure and collapse of the price-fixing conspiracy. Micron Complaint ¶¶25, 77.

Put simply, the DRAM price-fixing conspiracy alleged in the Infineon Action and Micron Action is the same price-fixing conspiracy that is the subject of the DRAM Antitrust Litigation pending before this Court. Infineon and Micron are, moreover, defendants in various of the individual actions that are part of the DRAM Antitrust Litigation. Apart from the allegations in the collateral actions regarding the defendants' false statements, the degree of overlap in the facts and issues in the Micron Action and the Infineon Action with the DRAM Antitrust Litigation approaches one hundred percent, particularly with respect to the existence of the conspiracy and the impact of that misconduct on DRAM price levels. Movants will use the evidence gathered in this case to demonstrate the impact of the inflated DRAM prices on Infineon's and Micron's securities prices. The underlying conspiracy is the same conspiracy. The main difference is that the injured parties in the antitrust actions were DRAM purchasers, while the injured parties in the Infineon Action and the Micron Action were Micron and Infineon investors. At the same time that Micron's and Infineon's

officers were engaged in the price-fixing conspiracy, they were encouraging investors with the increased or artificially maintained DRAM prices while concealing the fact that those prices were the product of the price-fixing conspiracy and misrepresenting to investors that the prices in the DRAM market were based on competition.

The Infineon and Micron Actions will require plaintiffs to prove both the existence of the price-fixing conspiracy (including its duration) and the impact of the conspiracy on DRAM prices, given that Micron's and Infineon's securities prices paralleled DRAM price-movements. While Infineon's and Micron's misconduct will be a focus of the collateral actions, discovery in those actions will not be limited to Infineon and Micron. It will be necessary to take discovery of various participants in the price-fixing conspiracy in order to demonstrate the impact of the conspiracy on DRAM prices. Much of the necessary discovery, however, has already been produced and the evidence has already been gathered in the proceedings before this Court. As such, a substantial amount of the discovery undertaken in the DRAM Antitrust Litigation will be relevant to the Micron and Infineon Actions.

IV. Modification of the July 11, 2003 Protective Order Would Likely Result in Enormous Cost and Time Savings in the Collateral Securities Actions

Plaintiffs in the Infineon Action and Micron Action understand that hundreds of thousands, if not millions, of pages of documents have been reviewed and produced in the DRAM Antitrust Litigation. In addition, dozens of depositions have been taken in that action. Discovery has been obtained from numerous non-parties. Movants, of course, cannot know the precise extent of the discovery because of the July 11, 2003 Protective Order.

One of the principal goals of the FRCP is, moreover, the "speedy, and inexpensive determination of every action." FRCP 1. In this case, it is absurd to re-invent the wheel. It is likely that the vast bulk of documents necessary for the Infineon and Micron Actions have already been gathered and produced in the DRAM Antitrust Litigation. It might easily take over a year to "re-gather" those documents, when they could easily be made available in a matter of days.

At the same time, since discovery in the DRAM Antitrust Litigation will be limited to documents relating to the DRAM price-fixing conspiracy, there is little or no risk that movants

would gain access to documents that do not relate to the price-fixing conspiracy. Much, if not most, of that discovery will be directly relevant to the issues in the Securities Actions and no proper purpose is served in prohibiting the Securities Plaintiffs from accessing that information.

On March 6, 2008, movants asked various parties in the DRAM Antitrust Litigation to stipulate to the relief requested in this motion, but various parties declined to agree.

V. CONCLUSION

Movants respectfully request that the Court modify the July 11, 2003 Protective Order to allow the disclosure to movants of materials and information in the DRAM Antitrust Litigation designated confidential or highly confidential or filed under seal.

DATED: June 11, 2008

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
JOHN K. GRANT
CHRISTOPHER M. WOOD

s/ John K. Grant
JOHN K. GRANT

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

MURRAY, FRANK & SAILER LLP
BRIAN P. MURRAY
275 Madison Avenue, Suite 801
New York, NY 10016
Telephone: 212/682-1818
212/682-1892 (fax)

Co-Lead Counsel for Intervening Plaintiffs

VANOVERBEKE MICHAUD
& TIMMONY, P.C.
MICHAEL J. VANOVERBEKE
THOMAS C. MICHAUD
79 Alfred Street
Detroit, MI 48201
Telephone: 313/578-1200
313/578-1201 (fax)

TILP PLLC
MARC SCHIEFER

140 Broadway
New York, NY 10005
Telephone: 212/907-0635
212/818-0477 (fax)

Additional Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 11, 2008.

s/ John K. Grant
JOHN K. GRANT

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
100 Pine Street, 26th Floor
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

E-mail:johnkg@csgrr.com

Mailing Information for a Case M:02-cv-01486-PJH

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Mario Nunzio Alioto**
  malioto@tatp.com
- **Aton Arbisser**
  aarbisser@kayescholer.com,vhuntley@kayescholer.com
- **Brett D Baber**
  bbaber@lanhamblackwell.com
- **Christine Pedigo Bartholomew**
  cbartholomew@finkelsteinthompson.com,sanfran@finkelsteinthompson.com
- **Joseph M. Barton**
  jmb@gbcslaw.com,cgw@gbcslaw.com,efilingnotices@gbcslaw.com,cdl@gbcslaw.com
- **Jeffrey A. Bartos**
  jbartos@geclaw.com
- **Mila F Bartos**
  mbartos@finkelsteinthompson.com
- **Timothy D. Battin**
  tbattin@straus-boies.com,jmoser@straus-boies.com,ecf@straus-boies.com
- **Adam C. Belsky**
  adam@grossbelsky.com
- **Na'il Benjamin**
  nbenjamin@orrick.com,cferrari@orrick.com
- **Natalie Finkelman Bennett**
  nfinkelman@sfmslaw.com,pmauger@sfmslaw.com
- **Steven H. Bergman**
  sbergman@omm.com,rsigua@omm.com,jchang@omm.com
- **Steve W. Berman**
  steve@hbsslaw.com,robert@hbsslaw.com,heatherw@hbsslaw.com
- **Daniel Edward Birkhaeuser**
  dbirkhaeuser@bramsonplutzik.com
- **Garrett D. Blanchfield , Jr**
  g.blanchfield@rwblawfirm.com,k.schulte@rwblawfirm.com
- **David Boies , III**
  dboies@straus-boies.com,tpalumbo@straus-boies.com
- **Robert J. Bonsignore**
  rbonsignore@bandblaw.net,alakin@bandblaw.net
- **Albert J. Boro , Jr**
  albert.boro@pillsburylaw.com,robert.foley@pillsburylaw.com
- **Francis A. Bottini , Jr**
  frankb@johnsonbottini.com
- **Peter Manfred Bransten**
  peter.bransten@pillsburylaw.com
- **C. Dewey Branstetter , Jr**
  cdbjr@branstetterlaw.com,cbatey@branstetterlaw.com
- **Rachel S. Brass**
  rbrass@gibsondunn.com,smaruschak@gibsondunn.com
- **Julian Brew**
  jbrew@kayescholer.com,dclow@kayescholer.com
- **David C. Brownstein**
  dbrownstein@hewm.com,scott.morgan@hellerehrman.com,victor.gonzales@hellerehrman.com,angela.rafoth@hellerehrman.com,aaron.armstrong@hellerehrman.com,c
- **Terrence A. Callan**
  terrence.callan@pillsburylaw.com

- **Michael Cecchini**
mcecchini@gibsondunn.com,bhonniball@gibsondunn.com
- **Shannon P. Cereghino**
spc@ftllaw.com
- **Jane Yang Chang**
jchang@omm.com
- **Henry A. Cirillo**
Hcirillo@furth.com,gmgray@furth.com,newman@furth.com,czapanta@furth.com
- **Stephen E. Connolly**
sconnolly@sbclasslaw.com
- **Josef D. Cooper**
jdc@coopkirk.com,bogdanorck@aol.com
- **Craig C. Corbitt**
ccorbitt@zelle.com
- **Jeffrey J. Corrigan**
jcorrigan@srk-law.com
- **Nathanael M. Cousins**
nat.cousins@usdoj.gov,liliana.vallejo@usdoj.gov
- **Christine Elaine Cwiertny**
CCwiertny@crowell.com
- **Daniel Tadeusz Dobrygowski**
ddobrygowski@jonesday.com
- **Wyatt B. Durrette , Jr**
wdurrette@durrettebradshaw.com,twhitlock@durrettebradshaw.com,ejw@durrettebradshaw.com,kmoran@durrettebradshaw.com,cwilliams@durrettebradshaw.com,lga
- **David Eiseman**
davideiseman@quinnemanuel.com,rosannawoods@quinnemanuel.com,westonreid@quinnemanuel.com
- **Mary Jane Edelstein Fait**
fait@whafh.com
- **James J. Ficenec**
Jficenec@sellarlaw.com,kmetler@sellarlaw.com
- **Kathleen E. Foote**
kathleen.foote@doj.ca.gov
- **Harrison J. Frahn , IV**
hfrahn@stblaw.com,tstout@stblaw.com,pkim@stblaw.com,aoles@stblaw.com,iyoung@stblaw.com,asemet@stblaw.com,jkline@stblaw.com,jbussey@stblaw.com,mke
- **Robert E. Freitas**
rfreitas@orrick.com,marlantico@orrick.com
- **Kent A. Gardiner**
kgardiner@crowell.com
- **Anthony J. Gaughan**
Agaughan@gklaw.com
- **Edward M. Gergosian**
ed@gergosian.com,johanna@gergosian.com
- **Kenneth George Gilman**
kgilman@gilmanpastor.com,rpotkay@gilmanpastor.com
- **Philip Howard Gordon**
pgordon@gordonlawoffices.com,tmurphy@gordonlawoffices.com
- **Robert J. Gralewski , Jr**
bob@gergosian.com,johanna@gergosian.com
- **Robert S. Green**
CAND.USCOURTS@CLASSCOUNSEL.COM
- **Steven J. Greenfogel**
sgreenfogel@mcgslaw.com,apaul@mcgslaw.com
- **Francis M. Gregorek**
gregorek@whafh.com
- **Paul R. Griffin**
pgriffin@thelen.com

- **R. Dale Grimes**
  dgrimes@bassberry.com,msullivan@bassberry.com
- **Terry Gross**
  terry@grossbelsky.com,joann@grossbelsky.com
- **Daniel E. Gustafson**
  dgustafson@gustafsongluek.com,rhoule@gustafsongluek.com
- **Ryan M. Hagan**
  rhagan@alexanderlaw.com,bhoy@alexanderlaw.com,jbaker@alexanderlaw.com
- **Gary L. Halling**
  ghalling@smrh.com,mscarborough@sheppardmullin.com,tcunningham@sheppardmullin.com,ewhite@smrh.com,tilee@sheppardmullin.com,eparis@sheppardmullin.cc
- **Jeremiah F. Hallisey**
  jfhallisey@yahoo.com
- **E. Anne Hawkins**
  ahawkins@orrick.com
- **Joshua David Hess**
  jhess@gibsondunn.com,dreger@gibsondunn.com
- **May Lee Heye**
  may.heye@usdoj.gov,SanFran.ATR@usdoj.gov
- **Jay L. Himes**
  jay.himes@oag.state.ny.us
- **Rodney Michael Hudson , Esq**
  rodney.hudson@dbr.com,Alldrila@DBR.com
- **Fred Taylor Isquith**
  isquith@whafh.com
- **Jonathan M. Jacobson**
  jjacobson@wsgr.com,ageritano@wsgr.com
- **Mark Alan Jacobson**
  mjacobson@lindquist.com
- **Charlene Haught Johnson**
  haughtjohnson@yahoo.com
- **Dennis James Johnson**
  email@jpclasslaw.com
- **Douglas S. Johnston**
  djohnston@barrettjohnston.com
- **Willem F. Jonckheer**
  wjonckheer@schubert-reed.com
- **Charles M. Kagay**
  cmk@slksf.com
- **Ralph B. Kalfayan**
  rkalfayan@kkbs-law.com,aimee@kkbs-law.com,dyakoubian@krausekalfayan.com,ashley@kkbs-law.com
- **Steven A. Kanner**
  kanner@fklmlaw.com
- **Daniel R. Karon**
  karon@gsk-law.com,mcfeeley@gsk-law.com
- **Jeremy Raphael Kasha**
  Jeremy.Kasha@oag.state.ny.us,saami.zain@oag.state.ny.us,Arlene.Leventhal@oag.state.ny.us
- **Laurence D. King**
  lking@kaplanfox.com,ldannunzio@kaplanfox.com,agutierrez@kaplanfox.com,lbrody@kaplanfox.com
- **Kathryn D. Kirmayer**
  kkirmayer@crowell.com
- **Kimberly Ann Kralowec**
  kkralowec@schubertlawfirm.com
- **James Glenn Kreissman**
  jkreissman@stblaw.com
- **Susan Gilah Kupfer**
  skupfer@glancylaw.com,sfreception@glancylaw.com

- **Samuel W. Lanham , Jr**
slanham@lanhamblackwell.com,sconnors@lanhamblackwell.com,bbaber@lanhamblackwell.com
- **Peter Nels Larson**
pnlarson@jonesday.com
- **Rebecca Justice Lazarus**
rjustice@gibsondunn.com,kclune@gibsondunn.com,rmcbain@gibsondunn.com
- **Christopher L. Lebsock**
clebsock@cmht.com,tsmall@cmht.com
- **Frank Christian Liuzzi**
frank@lmslaw.com,martin@lmslaw.com
- **James M. Lockhart**
jlockhart@lindquist.com,ajones@lindquist.com,amason@lindquist.com,sgoettl@lindquist.com,jmccarthy@lindquist.com,dhilgers@lindquist.com,mjacobson@lindquis
- **Kevin Bruce Love**
klove@hanzmancriden.com
- **Christopher Lovell**
clovell@lshllp.com
- **Cathy Yunshan Lui**
clui@orrick.com,jknight@orrick.com
- **Niall Edmund Lynch**
Niall.Lynch@USDOJ.GOV,Paula.Lattimore@USDOJ.GOV
- **Alexander Fraser MacKinnon**
alexander_mackinnon@la.kirkland.com
- **John A. Macoretta**
jmacoretta@srk-law.com
- **Matthew Patrick Maniscalco**
mmaniscalco@straus-boies.com,kwalsh@straus-boies.com
- **Timothy Michael Martin**
tmartin@omm.com
- **Peter John McDougall**
pmcdougall@jpclasslaw.com,sporter@jpclasslaw.com
- **James Landon McGinnis**
jmcginnis@sheppardmullin.com
- **Peter J. McNulty**
peter@mcnultylaw.com,sean@mcnultylaw.com
- **Joel Cary Meredith**
jmeredith@mcgslaw.com,apaul@mcgslaw.com
- **Christopher Thomas Micheletti**
cmicheletti@zelle.com
- **Tracie C. Militano**
Tracie.Militano@dbr.com
- **Marvin Alan Miller**
mmiller@millerlawllc.com,kpulido@millerlawllc.com,Jramirez@millerlawllc.com
- **Daniel Jay Mogin**
dmogin@moginlaw.com
- **Kathy Lee Monday**
kmonday@damrell.com,NWeston-Dawkes@damrell.com
- **Steven H. Morrissett**
morrissett@finnegan.com,georgia.merner-becker@finnegan.com,marc.deleon@finnegan.com,wendy.herby@finnegan.com,gail.selburn@finnegan.com
- **Jerome A. Murphy**
jmurphy@crowell.com,phinson@crowell.com
- **William Timothy Needham**
tneedham@janssenlaw.com,estephens@janssenlaw.com
- **Peter Bruce Nemerovski**
petenemo@yahoo.com
- **George Charles Nierlich , III**
cnierlich@gibsondunn.com,bsperry@gibsondunn.com

- **D. Michael Noonan**
  mnoonan@shaheengordon.com,pattikretschmar@shaheengordon.com
- **Tim David Nord**
  tim.d.nord@state.or.us,melissa.curtis@state.or.us
- **Kevin J. O'Connor**
  Koconnor@gklaw.com
- **Thomas Joseph O'Reardon , II**
  to'reardon@csgrr.com
- **Kenneth Ryan O'Rourke**
  korourke@omm.com,tbecerra@omm.com
- **Ian Otto**
  iotto@straus-boies.com,ncihlar@straus-boies.com
- **Joseph Marid Patane**
  jpatane@tatp.com
- **Bernard Persky**
  bpersky@labaton.com
- **Alan R Plutzik**
  aplutzik@bramsonplutzik.com
- **Robert Benard Pringle**
  rbpringle@thelen.com
- **Merrick Scott Rayle**
  mrayle@lshllp.com,msrayle@sbcglobal.net
- **Ronald Charles Redcay**
  ronald_redcay@aporter.com,guadalupe_perales@aporter.com
- **Charles Philip Reichmann**
  charles.reichmann@usdoj.gov,liliana.vallejo@usdoj.gov
- **Ira Neil Richards**
  irichards@trrlaw.com
- **Kevin Peter Roddy**
  kroddy@wilentz.com
- **Gabriel Neil Rubin**
  grubin@stblaw.com,jlaw@stblaw.com,hlelaind@stblaw.com
- **Geoffrey Conrad Rushing**
  grushing@saveri.com
- **Lauren Clare Russell**
  laurenrussell@tatp.com
- **Joel Steven Sanders**
  jsanders@gibsondunn.com,smaruschak@gibsondunn.com
- **Servando R. Sandoval**
  ssandoval@pahl-mccay.com
- **Guido Saveri**
  guido@saveri.com
- **Richard Alexander Saveri**
  rick@saveri.com
- **Francis Onofrei Scarpulla**
  fscarpulla@zelle.com,mbibbs@zelle.com
- **Alexander Michael Schack**
  amslawoffice@aol.com
- **Roger M. Schrimp**
  rschrimp@damrell.com
- **Robert C. Schubert**
  rschubert@schubert-reed.com
- **Richard Leonard Schwartz**
  Richard.Schwartz@oag.state.ny.us
- **James Craig Shah**
  jshah@sfmslaw.com

- **Anthony D. Shapiro**
  tony@hbsslaw.com,george@hbsslaw.com,ronnie@hbsslaw.com
- **Tanja K. Shipman**
  tshipman@kayescholer.com
- **Edward Frank Siegel**
  efsiegel@efs-law.com,efsiegel@apk.net
- **Fred A. Silva**
  fsilva@damrell.com
- **Ian T Simmons**
  isimmons@omm.com
- **Bruce Lee Simon**
  bsimon@psswplaw.com,jwatkins@psswplaw.com,cthomas@psswplaw.com,dwarshaw@psswplaw.com,avargas@psswplaw.com,bpouya@psswplaw.com,cpearson@ps
- **Clyde E Sniffen , Jr**
  Ed_Sniffen@law.state.ak.us,Shelly_Mccormick@law.state.ak.us
- **David Dong-In Sohn**
  david.sohn@ogletreedeakins.com
- **Mona Solouki**
  msolouki@sheppardmullin.com,tilee@sheppardmullin.com,ewhite@sheppardmullin.com,khollenbeck@sheppardmullin.com
- **Gary Laurence Specks**
  gspecks@kaplanfox.com
- **Eugene A. Spector**
  espector@srk-law.com
- **John St. John**
  johnstjohn2004@yahoo.com
- **Joshua Stewart Stambaugh**
  jstambaugh@kayescholer.com,vhuntley@kayescholer.com
- **Dennis Stewart**
  dstewart@hulettharper.com,office@hulettharper.com
- **Allan Steyer**
  asteyer@steyerlaw.com,lrorem@steyerlaw.com
- **James G. Stranch , III**
  jgs@branstetterlaw.com,wmagner@branstetterlaw.com,gstranch@branstetterlaw.com,cbatey@branstetterlaw.com
- **Jonathan Edward Swartz**
  jswartz@thelen.com,ndelich@thelen.com
- **Bonny E. Sweeney**
  bonnys@csgrr.com,tturner@csgrr.com,E_file_sd@csgrr.com
- **Joseph J. Tabacco , Jr**
  jtabacco@bermanesq.com,ysoboleva@bermanesq.com
- **Michael Frederick Tubach**
  mtubach@omm.com,kquintanilla@omm.com
- **Howard Mark Ullman**
  hullman@orrick.com
- **Emilio Eugene Varanini , IV**
  Emilio.Varanini@doj.ca.gov,Danielle.BoullyChinn@doj.ca.gov
- **Clinton Paul Walker**
  cwalker@damrell.com,mfildes@damrell.com
- **Jenelle Welling**
  CAND.USCOURTS@classcounsel.com
- **Lisa Marie Williams**
  lwilliams@steyerlaw.com
- **Steven Noel Williams**
  swilliams@cpmlegal.com,jverducci@cpmlegal.com,dburwell@cpmlegal.com,cwalker@cpmlegal.com,rjit@cpmlegal.com,aliang@cpmlegal.com,mcompesi@cpmlegal
- **Lingel Hart Winters**
  sawmill2@aol.com
- **Alfred Glenn Yates , Jr**
  yateslaw@aol.com

- **Cadio Zirpoli**
  zirpoli@saveri.com
- **Cynthia A. Zuniga**
  cwickstrom@orrick.com,afreddie@orrick.com
- **Jason Allen Zweig**
  jzweig@kaplanfox.com,rkilsheimer@kaplanfox.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Daniel Lee Alexander
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071

Monique Alonso
Gross & Belsky LLP
180 Montgomery Street, Suite 2200
San Francisco, CA 94104

Scott Ames
Serratore & Ames
1880 Century Park East, Suite 808
Los Angeles, CA 90067

Kevin Arquit
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954

William J. Baer
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004-1206

Christopher A. Bandas
Bandas Law Firm, P.C.
500 N. Shoreline, Ste. 1020
Corpus Christi, TX 78471

Eileen Barish
Kirkland & Ellis
777 S. Figueroa Street
Los Angeles, CA 90017

G. Michael Barnhill
Womble Carlyle Sandridge & Rice PLLC
One Wachovia Center
Suite 3500
301 College Street
Charlotte, NC 28202-6025

R. Jeffrey Behm
Sheehey Furlong & Behm PC
P.O. Box 66
Burlington, VT 05402-0066

John J. Bogdanor
Cooper & Kirkham, P.C.
655 Montgomery Street, 17th Floor
San Francisco, CA 94111

David Boies
Straus & Boies
10513 Braddock Road
Fairfax, VA 22032

Debra L. Bouffard
Sheehey Furlong & Behm PC
P.O. Box 66
Burlington, VT 05402-0066

Van Bunch
Bonnett Fairbourn Friedman & Balint PC
57 Carriage Hill
Signal Mountain, TN 37377

Peter F. Burns
Thelen Reid & Priest LLP
101 Second Street
Suite 1800
San Francisco, CA 94105-3606

Celestica Corporation
Pahl & Gosselin
225 W. Santa Clara Street
Suite 1500
San Jose, CA 95113

Lynnette D. Chen
Janssen Malloy Needham Morrison & Reinholtsen, LLP
730 Fifth Street
P.O. Drawer 1288

Eureka, CA 95501

Cecil S. Chung
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
P.O. Box 7880
San Francisco, CA 94120-7880

Christine Hart Clay
Gibson, Dunn & Crutcher, LLP
One Montgomery Street
Suite 3100
San Francisco, CA 94104

Anna C. Conley
Zelle Hofmann Voelbel Mason & Gette LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104

Jim D. Cooley
Womble Carlyle Sandridge & Rice PLLC
One Wachovia Center
Suite 3500
301 South College Street
Charlotte, NC 28202-6025

Jeffrey S. Davidson
Kirkland & Ellis
777 S. Figueroa Street
Los Angeles, CA 90017

David A. Donohoe
Akin Gump Strauss Hauer & Feld LLP
590 Madison Avenue
New York, NY 10022

Dram Claims Liquidation Trust
Sellar Hazard Manning Ficenec & Lai
1800 Sutter Street
Suite 460
Concord, CA 94520

Mary Jane Edelstein
Wolf Heldenstein Alder Freeman & Herz
626 West Randolph
Suite 5W
Chicago, IL 60661

David R. Esquivel
Bass Berry & Sims
315 Deaderick Street
Nashville, TN 37238-0002

William S Farmer
Collette Erickson Farmer & O'Neill LLP
235 Pine Street
Suite 1300
San Francisco, CA 94104-2733

Christopher James Flack
Arnold & Porter LLP
555 12th Street NW
Washington, DC 20004

Lisa J. Frisella
The Mogin Law Firm, PC
110 Juniper Street
San Diego, CA 92101-1502

Scott Alan George
Sheller, Ludwig & Badey
1528 Walnut Street
Third Floor
Philadelphia, PA 19102

Daniel S. Glaser
McNulty Law Firm
827 Moraga Drive
Bel Air, CA 92101-1502

Steven M. Gordon
107 Storrs Street
Concord, NH 03301

Humberto Guzman-Rodriguez
P.O. Box 71405
San Juan, PR 00936-8505

Richard M. Hagstrom
Zelle Hofmann Voelbel Mason & Gette LLP
500 Washington Avenue South, Suite 4000
Minneapolis, MN 55415

Hal Hardin
218 Third Avenue North
Nashville, TN 37210

Christopher J. Heck
Kirkland & Ellis
777 S. Figueroa Street

Los Angeles, CA 90017

Edward W. Hill-Tollinche
P.O. Box 71405
San Juan, PR 00936-8505

Richard A. Huser
Thomson Inc.
10330 North Meridian Street
Indianapolis, IN 46290

Tracy R. Kirkham
Cooper & Kirkham, P.C.
655 Montgomery Street, 17th Floor
San Francisco, CA 94111

Mary Gilmore Kirkpatrick
Lisman Webster Kirkpatrick & Leckerling, P.C.
P.O. Box 728
Burlington, VT 05402-0728

Gary Kostow
35 E. State Street
Media, PA 19063

Daniel W. Krasner
Wolf Haldenstein Adler Freeman & Herz LLP
270 Madison Avenue
New York, NY 10016

Arturo Luciano-Delgado
Arturo Luciano Law Office
1055 JF Kennedy Avenue PH-B
San Juan, PR 00920-1711

D. Scott Macrae
Steyer Lowenthal Boodrookas Alvarez & Smith LLP
One California Street
Third Floor
San Francisco, CA 94111

Steven Albert Mansfield
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067

Sarretta McDonough
Kirkland & Ellis LLP
777 S. Figueroa Street
Los Angeles, CA 90017

Chad M. McManamy
The Mogin Law Firm, PC
110 Juniper Street
San Diego, CA 92101-1502

James E. Miller
Shepherd, Finkelman, Miller & Shah, LLC
65 Main Street
Chester, CT 06412

Wilson D. Mudge
Arnold & Porter
555 Twelfth St., N.W.
Washington, DC 20004-1202

D. J. Pascoe
Michigan Department of Attorney General
525 W. Ottawa
P.O. Box 30212
Lansing, MI 48909

William F. Patterson , Jr
Forman Rossabi Black P.A.
P.O. Box 41027
Greensboro, NC 27404-1027

LeRoy Davis Percy
Tollison Law Firm P.A.
P.O. Box 1216
Oxford, MS 38655-1216

Ashley Pritchett
Bonsignore & Brewer
23 Forest Street
Medford, MA 02155

Mark Reinhardt
Reinhardt Wendorf & Blanchfield
East 1000 First National Bank Building
322 Minnesota Street
St. Paul, MN 55101

Henry Huntington Rossbacher
The Rossbacher Firm
Suite 1650
811 Wilshire Boulevard
Los Angeles, CA 90017-2666

Linda S. Schmidt
One East Main Street
Suite 500
P.O. Box 2719
Madison, WI 53701-2719

Steven J. Serratore
Serratore & Ames
1880 Century Park East, Suite 808
Los Angeles, CA 90067

William Shaheen
Shaheen & Gordon
P.O. Box 977
Dover, NH 03821-0977

Scott R. Shepherd
35 E. State Street
Media, PA 19063

Matthew J. Sinback
Bass Berry & Sims PLC
Amsouth Center
315 Deaderick Street
Suite 2700
Nashville, TN 37238-3001

Jeremy C. Sink
McKay Burton & Thurman
170 S Main
Suite 800
Salt Lake City, UT 84101

Robert A. Skitol
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005

Tefft W. Smith
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005-5973

Michael Solomon
Lingel H. Winters P.C.
One Maritime Plaza Suite 400
San Francisco, CA 94111

Craig R. Spiegel
Hagens Berman Sobol Shapiro LLP
1301 Fifth Avenue
Suite 2900
Seattle, WA 98101

Paul J. Stancil
780 North Water Street
13th Floor
Milwaukee, WI 53202

State of California et al
Office of the Attorney General of the State of California
300 S. Spring St.
Los Angeles, CA 90013-1230

State of Maryland
,

Adam Stein
Ferguson Stein Wallas Adkins Gresham & Sumter, PA
312 W. Franklin Street
Suite 2
Chapel Hill, NC 27516

Jonathan L. Stern
Arnold & Porter LLP
555 12th Street, N.W.
Washington, DC 20004

Gene J. Stonebarger
Damrell, Nelson, Schrimp, Pallios, Pache
1601 "I" Street
Fifth Floor
Modesto, CA 95354

James G. Stranch , IV
Branstetter Kilgore Stranch & Jennings
227 Second Avenue, North
4th Floor
Nashville, TN 37201

Sun Microsystems, Inc.
Crowell & Moring
3 Park Plaza
20th Floor
Irvine, CA 92614-8505

Douglas G. Thompson , Jr
Finkelstein Thompson & Loughran
1050 30th Street, N.W.

Washington, DC 20007

Unisys Corporation
Unisys Way
Blue Bell
Blue Bell, PA 19424

Richard G. Urquhart
Zelle Hofmann Voelbel Mason & Gette LLP
1201 Main Street, Suite 3000
Dallas, TX 75202

Richard L. Voelbel
Zelle Hofmann Voelbel Mason & Gette LLP
500 Washington Avenue South, Suite 4000
Minneapolis, MN 55415

Kenneth M. Vorrasi
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005

Karen Walker
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005-5793

Allan O. Walsh
McKay Burton & Thurman
170 S Main
Suite 800
Salt Lake City, UT 84101

Kenneth G. Walsh
Barrett, Gravante, Carpinello & Stein
570 Lexington Ave. 16th Floor
New York, NY 10022

Mark A. Wendorf
Reinhardt Wendorf & Blanchfield
East 1000 First National Bank Building
322 Minnesota Street
St. Paul, MN 55101

Brooke Elizabeth West
Gergosian & Gralewski
655 West Broadway
Suite 1410
San Diego, CA 92101

Michael N. Widener
Bonnett Fairbourn Friedman & Balint PC
57 Carriage Hill
Signal Mountain, TN 37377

James F. Wyatt , III
Wyatt & Blake LLP
435 East Morehead Street
Charlotte, NC 28202-2609

Victor de Dios
Shartsis Friese LLP
One Maritime Pl., 18th Fl.
San Francisco, Ca 94111